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No. 10-107

Supreme Court, U.S.
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In The
Supreme Court of the United States

PATRIZIA RICCARDI,

Petitioner,

v.

ROBERT KESSLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioner's statement of questions presented is misleading and mischaracterizes the rulings of the lower courts. A proper statement of the questions presented is as follows:

1. Did the Court of Appeals err in finding that the District Court did not abuse its discretion in permitting Respondent to offer evidence that Petitioner had shared with Respondent intimate details about her sexual life on the basis that this evidence went to the heart of the Respondent's core defense that he and Petitioner shared a consensual, intimate relationship?

2. Was Petitioner deprived of Due Process by the fact that District Court Judge Thomas Wiseman did not recuse himself when no actual or apparent conflict of interest existed and when the Court of Appeals refused to consider this issue, which Petitioner failed to raise at the trial court level?

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STATEMENT OF THE CASE

Petitioner, Patrizia Riccardi, a psychiatrist, began a medical research fellowship in the Radiology Department at Vanderbilt University Medical Center ("Vanderbilt") in September 2003 under the supervision of the Respondent, Dr. Robert Kessler, also a Vanderbilt employee. Petitioner alleges that Respondent began sexually harassing her in November 2003, which gradually worsened and culminated in a physical altercation at a Toronto professional conference that Petitioner characterizes as a battery and attempted rape. Respondent denies these allegations, contending that the two began an on-again-off-again consensual affair in January 2004 that lasted until June 2005, and that he, not Petitioner, was the victim of the physical altercation in Toronto. [Appendix A to Petition at page 3a].

After the Toronto altercation, in June of 2005, Petitioner made a report of sexual harassment and attempted rape against Respondent to their employer, Vanderbilt. Vanderbilt authorities conducted an investigation, ultimately concluding that the evidence was insufficient to substantiate Petitioner's claims. During the investigation, Respondent told Vanderbilt authorities that he and Petitioner had engaged in a consensual sexual relationship. Vanderbilt thereafter strictly limited the interactions between Petitioner and Respondent. [*Id.* at pages 3a-4a].

In June 2006, Petitioner filed a sexual harassment complaint against Vanderbilt, the Respondent

and radiology department chair, Dr. Martin Sandler ("Sandler"). She raised a state-law claim for retaliation against Respondent individually, along with claims for battery and intentional infliction of emotional distress stemming from the physical altercation in Toronto. Respondent countersued, alleging defamation as well as assault and battery claims based on the Toronto incident. Petitioner settled her claims against Vanderbilt and Sandler, and they were dismissed from this action prior to trial. [*Id.* at page 4a].

Petitioner alleged that Respondent unlawfully retaliated against her by inadequately supporting her grant-writing efforts and by refusing to include her on a number of his own grant proposals. The District Court granted partial summary judgment to Respondent regarding his conduct on five of the grants, finding that Respondent presented legitimate non-retaliatory reasons for his actions and that Petitioner had not shown a genuine factual issue as to whether the stated reasons were pretextual. As for Respondent's actions on two of the research projects, however, the District Court found a sufficient question of fact to at least warrant a trial. With the issues limited to Petitioner's remaining two allegations of retaliatory conduct, Respondent's defamation claim and both of their personal-injury claims, the case proceeded to trial. At the close of the evidence and before the case went to the jury, the District Court granted Respondent's motion for judgment as a matter of law on Petitioner's remaining two allegations of retaliation,

determining that Petitioner neither established that she suffered any adverse action nor demonstrated that the explanations Respondent gave for his actions were pretextual. [*Id.* at pages 4a-5a].

In order to establish his core defense – that Respondent and Petitioner had engaged in a consensual relationship – Respondent sought to offer evidence that Petitioner had shared with him intimate details of her sexual life, which she would have done only if the two shared an intimate personal relationship. Petitioner objected to this evidence, and the District Court overruled Petitioner's objection, citing the well-established Rule of Evidence 412(b)(2), which permits evidence pertaining to an alleged victim's sexual history if its probative value substantially outweighs the danger of harm or unfair prejudice. [*Id.* at pages 14a-15a].

After weighing all the evidence, the jury rejected Petitioner's claims and found in Respondent's favor on all claims, awarding him $15,000 in damages for battery, $10,000 in compensatory damages for assault, $500,000 in actual monetary damages for defamation, $1,500,000 in other compensatory damages for defamation and $950,000 in punitive damages. The District Court granted Petitioner's motion for remittitur, decreasing the compensatory damages award from $1,500,000 to $250,000 and the punitive damages award from $950,000 to $250,000, which Respondent accepted. The District Court entered a final judgment. [*Id.* at pages 5a-6a].

Petitioner appealed the judgment to the United States Court of Appeals for the Sixth Circuit. After Petitioner filed her brief in the Court of Appeals, she filed a motion to amend her brief to raise a new argument that District Court Judge Thomas Wiseman had a conflict of interest due to his ties to Vanderbilt as an additional basis for granting her a new trial, an issue which she had not previously raised at the District Court level or in her initial brief on appeal. In that motion, she misleadingly refers to Vanderbilt as "a defendant in the case" despite the fact that Vanderbilt had been dismissed after settling with Petitioner long before she and Respondent alone went to trial. [Appendix B to the Petition at page 28a]. The Sixth Circuit Court of Appeals denied Petitioner's motion [Appendix A to the Petition at page 3a].

The Court of Appeals reversed the District Court's pre-verdict grant of judgment as a matter of law on Petitioner's retaliation claim but upheld the judgment on all other counts, including the compensatory damages and punitive damages award obtained by Respondent for prevailing on his assault and battery and defamation claims. The case was remanded to the District Court for trial on Petitioner's remaining retaliation claims. [*Id.* at page 28a].

Petitioner now seeks a writ of certiorari with this Court.

However, on remand in the District Court, Petitioner filed a motion to vacate the previous judgment

pursuant to Federal Rule of Civil Procedure 60 on the argument that Judge Wiseman should have recused himself prior to trial due to conflict of interest. [Respondent Appendix A at App. 1]. This was the first time this issue had been raised at the trial court level. District Court Judge William Haynes denied Petitioner's motion. [*Id.* at App. 1]. On June 18, 2010, Petitioner again appealed to the Sixth Circuit Court of Appeals, seeking review of the issue of whether the District Court Judge should have recused himself due to a conflict of interest arising from his prior connections to Vanderbilt. [Respondent Appendix B at App. 3]. Thus, this issue is not only before this Court, but is simultaneously before the Sixth Circuit Court of Appeals after Petitioner finally raised it at the trial court level.

REASONS THE PETITION SHOULD BE DENIED

I. Petitioner Fails to Establish Compelling Reasons for Review by the United States Supreme Court

Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for "compelling reasons," and is rarely granted when the asserted error consists of "erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioner simply does not like the manner in which the District Court and Court of Appeals applied clearly established rules of law, and she

contends that the District Court abused its discretion in doing so. Petitioner does not establish any of the factors typically considered pursuant to Rule 10. She does not establish that the decision below conflicts with the decision of a federal court of appeals or a state court of last resort on an important federal question. She does not establish that the lower court decided an important question of federal law in a way that conflicts with a Supreme Court decision. She does not establish that the court below decided an important question of federal law that has not been, but should be, settled by the Supreme Court. She has not established that the lower court has so far departed from the accepted and usual course of proceedings as to require the Court's rarely invoked "supervisory power." She simply does not like the manner in which the lower courts applied clear rules of law.

Petitioner attempts to shoe-horn this case into the above factors by contending that the lower courts did act contrary to judicial precedent and departed from the accepted and usual course, but examination of the cases she cites refutes her claim. Petitioner does not actually establish any such important conflict. Rather, she cites cases applying these well-settled rules of law to diverse sets of facts and coming to different conclusions based on the specific facts of those cases. Petitioner simply does not like the manner in which the District Court properly exercised its discretion under the facts of this specific case. As discussed more fully in the following section, not only

is there no significant division or departure to create a "compelling reason" for review under Rule 10, but under the facts of this case, the lower courts' rulings also happened to be correct.

II. The Lower Courts' Decisions were Correct

A. The Court of Appeals did not err in finding that the District Court did not abuse its discretion in permitting Respondent to offer evidence that Petitioner had shared with Respondent intimate details about her sexual life on the basis that this evidence went to the heart of the Respondent's core defense that he and Petitioner shared a consensual, intimate relationship.

Respondent's core defense at trial was that he did not sexually harass or stalk Petitioner, but that they had a consensual, intimate sexual relationship that extended for many months. Petitioner denies that they had any such close relationship. However, the fact that Petitioner shared with Respondent intimate details of her personal life and relationships goes directly to Respondent's chief defense. The District Court properly found as follows:

> This testimony is relevant to the nature of the parties' relationship and their respective credibility, which are issues going to the very heart of this case. The probative value of this evidence therefore substantially outweighs

> the danger of harm to Dr. Riccardi resulting from its admission.

[Petitioner Appendix D at pages 97a-98a].

Not only is this ruling not an abuse of discretion, but it is correct. Furthermore, Petitioner actually first raised the subject voluntarily by testifying on *direct examination* by her counsel that she does not sleep with married men and therefore never would have slept with Respondent, opening the door to this issue on an additional basis and waiving any objection to it.

At trial, Petitioner's counsel questioned Petitioner about her past relationships in her case-in-chief. R. 265 (Tr. 135-38). He asked whether Petitioner discussed her previous relationships with Respondent, and Petitioner responded that she had. *Id.* Apparently attempting to refute Respondent's defense that they had a sexual relationship, Petitioner also testified on direct examination that she told Respondent she did not date married men, and that she had only done so once in her life. R. 265 (Tr. 136). Petitioner specifically testified that she had a "brief encounter" with a man in Italy. R. 265 (Tr. 139).

Respondent's counsel cross-examined Petitioner about her relationship with Respondent and her earlier testimony that she did not date married men. R. 266 (Tr. 409). On cross-examination, Respondent contradicted her earlier testimony and confirmed that she had indeed had relationships with other married men. R. 266 (Tr. 410-14). Petitioner initially denied

that she told Respondent about men she had slept with, but admitted that she told him about men with whom she had long love relationships in which sex was involved. R. 266 (Tr. 410). Petitioner also confirmed that she had a "sex encounter" with the man in Italy. R. 266 (Tr. 415). These are not the types of conversations one has with her "stalker."

As an initial matter, the challenged testimony is relevant to the nature of the relationship between Petitioner and Respondent. Petitioner testified that Respondent was a stalker and made her life a nightmare. R. 265 (Tr. 112, 114). She also testified that she did not date married men. R. 265 (Tr. 136). The fact that Petitioner discussed her past relationships with Respondent makes it less probable that she considered him to be a harasser and stalker or was otherwise afraid of him as she claimed. *See* Fed. R. Evid. 401. Questions about Petitioner's relationship with other married men were proper for the additional reason that they refuted her previous testimony denying that she dated married men.

The District Court did not abuse its discretion in admitting this relevant evidence. First, Rule 412 is not applicable because Respondent did not offer the testimony to prove that Petitioner "engaged in other sexual behavior" or to prove Respondent's "sexual predisposition." *See* Fed. R. Evid. 412. Instead, he offered the testimony to establish that Petitioner told him about intimate details of her relationships with other men, not to prove that she actually engaged in any sexual behavior.

Even if Rule 412 were applicable, all of the challenged testimony relates directly to the relationship between Petitioner and Respondent, so the probative value of the testimony substantially outweighs any risk of undue harm. *See Wilson v. City of Des Moines*, 442 F.3d 637, 643 (8th Cir. 2006) (employee's workplace behavior admissible under Rule 412 to show whether harassment was unwelcome); *Socks-Brunot v. Hirschvogel Inc.*, 184 F.R.D. 113 (D. Ohio 1999) (excluding proof because no connection with alleged harasser; proffered testimony therefore not probative of whether alleged sexual harassment was unwelcome because it had nothing to do with alleged harasser). Therefore, the District Court properly admitted testimony regarding Petitioner's relationship history.

The District Court also properly rejected Petitioner's arguments that the challenged testimony was inadmissible on other grounds. First, questions about Petitioner's relationships with other married men were proper cross examination to refute her testimony on direct examination. *United States v. Bender*, 265 F.3d 464, 471 (6th Cir. 2001) (permitting cross examination to impeach witness on matters addressed on direct). Also, since Petitioner voluntarily offered evidence that she had dated only one married man, her admission that she had at least one other affair and at least three affairs while she was married is highly probative of her truthfulness. *See* R. 266 (Tr. 310, 412-15).

In her Petition for Writ of Certiorari, Petitioner focuses on the *title* of Respondent's Rule 412 motion in limine, italicizing the words *Past Sexual Behavior and Sexual Predisposition* in an effort to establish that the purpose of this evidence was to establish that she was predisposed to certain sexual behavior. This argument is a red herring, as the language in the title of the motions is simply taken from the title of Rule 412, while the substance of the motion and the District Court's ruling goes directly to a salient and essential issue in this lawsuit – the nature of the relationship between Petitioner and Respondent, and not to her predisposition toward sex.

B. District Court Judge Thomas Wiseman did not err by failing to recuse himself when no actual or apparent conflict of interest existed, and the Court of Appeals did not err by refusing to consider this issue which Petitioner failed to raise at the trial court level.

Although she did not raise it at the trial level, Petitioner contends that she should be granted a new trial because District Court Judge Thomas Wiseman had a conflict of interest due to the facts that (1) he taught adjunct courses at Vanderbilt Law School from 1989 to 2004; (2) he has, in the past, received two awards from Vanderbilt (2004 Law School Distinguished Service Award and 2007 Sigma Chi award); (3) his son, a lawyer in Nashville, graduated from Vanderbilt, teaches a trial advocacy course there, and

is with a firm that periodically represents Vanderbilt (though with no relation to this case); and (4) he is a member of Vanderbilt Law School's leadership donor society.

Petitioner contends that because Judge Wiseman has connections to one of the defendants, the trial should be invalidated and a new trial granted. Petitioner ignores the fact that she settled with Vanderbilt long ago, and that Vanderbilt was not a defendant in this lawsuit at the time of trial. There is absolutely no evidence of any connection between Judge Wiseman and Respondent or any other party that had any stake at trial.

Even if Vanderbilt had been a defendant at trial, Judge Wiseman still would not have had an actual or apparent conflict of interest in hearing this case, such that he would be required to recuse himself. The standard is one of objective reasonableness, as recusal is appropriate only if the judicial officer's impartiality might reasonably be questioned under the circumstances. *See* 28 U.S.C. §455(a). This standard is well-articulated in *In re: Allied-Signal Inc., et al.*, 891 F.2d 967, 970 (1st Cir. 1989):

> We draw our legal standards for review of a district judge's decision not to disqualify himself from an analogous case, *In re United States*, 666 F.2d at 690. We there held (1) that "a charge of partiality must be supported by a *factual basis*," (2) that "disqualification is appropriate only if the facts provide what an objective, knowledgeable

member of the public would find to be a *reasonable basis* for doubting the judge's impartiality," and (3) that this court of appeals will allow the district judge "a range of discretion" in making these determinations. *Id.* at 695 (emphasis in original). Only if the District Court's decision to sit "*cannot be defended as a rational conclusion supported by reasonable reading of the record*" will we insist upon disqualification. *Id.* (emphasis added). *See United States v. Giorgi*, 840 F.2d 1022, 1034 (1st Cir.1988) ("The decision to grant or to deny a motion for disqualification is committed largely to the discretion of the trial court, and we review it solely to evaluate whether the decision below amounted to an abuse of discretion."). We also said that, when considering disqualification, District Court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. *In re United States*, 666 F.2d at 695 n. *. That is because the disqualification decision must reflect *not only* the need to secure public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking. *See, e.g., In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir.1988) ("A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."), *cert. denied sub. nom. Milken v. SEC*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012

> (1989); *In re United States,* 666 F.2d at 694; *United States v. Bray,* 546 F.2d 851, 857 (10th Cir.1976); *Alvarado Morales v. Digital Equipment Corp.,* 699 F.Supp. 16, 19 (D.P.R.1988) ("[I]t has been wisely observed that each judge must be alert to avoid the possibility that those who would question his impartiality are in reality seeking to avoid the consequences of his expected adverse decision. . . ."); H.R.Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 6351, 6355 ("Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."). Even though § 455 was intended to do away with the formal "duty to sit" doctrine, *see Blizard v. Frechette,* 601 F.2d 1217, 1220 (1st Cir.1979); H.R.Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 6351, 6355, the judge must still tread cautiously, recognizing, on the one hand, the great importance to the judicial institution of avoiding any appearance of partiality, while simultaneously remaining aware of the potential injustices that may arise out of unwarranted disqualification.

This case is similar to *Lunde v. Helms*, 29 F.3d 367 (8th Cir. 1994), *cert. denied*, 513 U.S. 1155, 115 S.Ct. 1111, 130 L.Ed.2d 1076 (1995) in which this Court denied a petition for writ of certiorari on precisely this issue after the Court of Appeals had held that recusal of the district judge was not warranted. In *Lunde v. Helms*, the University of Iowa was a

party-defendant. The Plaintiff (after having properly raised the issue at the trial court level, unlike the instant case) contended that the district judge was biased against her because of his association with the University of Iowa. The District Judge had graduated from the University of Iowa Law School, contributed to the University of Iowa Law School and presented educational programs there. The Eighth Circuit Court of Appeals provided the following discussion:

> We do not think that the district judge's having graduated from the university law school, even though the university is a party defendant, without more, is a reasonable basis for questioning the judge's impartiality. *See Easley v. University of Michigan Board of Regents*, 906 F.2d 1143, 1146-47 (6th Cir.1990) (judge's graduation from and affiliation with law school, which was party defendant, not grounds for recusal, absent evidence that judge was privy to extrajudicial information relating to student's situation at law school), *cert. denied*, 499 U.S. 947, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991); *Brody v. President of Harvard College*, 664 F.2d 10, 11 (1st Cir.1981) (per curiam) *371 (judge's having attended or graduated from university which was party to case, without more, not grounds for recusal), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982).
>
> In addition, we do not think the district judge has any financial interest in these proceedings. We do not think that making

> alumni contributions or participating in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality. *See Willner v. University of Kansas*, 848 F.2d at 1028 (participation in alumni activities). Even a substantial judgment against the university would have no financial impact on the district judge as a graduate of the university law school.

Lunde v. Helms, 29 F.3d at 370-301.

Furthermore, even if Vanderbilt had been a defendant at trial, and even if these facts did rise to the level of a conflict of interest, Petitioner failed to raise this issue in the District Court. Petitioner contends that she discovered this evidence, none of which is new and all of which is publicly available, and gives no reason why she did not or could not have discovered it or raised the issue prior to trial.

CONCLUSION

The law applicable to this case is settled. Petitioner has not established any compelling reason for this Court to grant her Petition. Respondent prays that the Court deny the Petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Patrizia Riccardi, Plaintiff, v. Robert Kessler, Defendant	))))))))	**CASE NO: 3:06-0605** **CASE NO: 3:06-0615** [ORDER Under the law of the case doctrine, this Motion is DENIED. The action will proceed only on the claims remanded by the Sixth Circuit. signed by District Judge William J. Haynes, Jr. 5-20-10]

PRO SE PLAINTIFF
DR. PATRIZIA RICCARDI'S
MOTION TO VACATE JUDGMENT

Plaintiff, Patrizia Riccardi, Pro Se, submits this motion pursuant to Fed.R.Civ.P. 60(b)(6), requesting the Court to vacate the judgment entered against Plaintiff and to reinstate this case nunc pro tunc on the basis that at the time District Court Judge Thomas Wiseman heard the case, he had an undisclosed conflict of interest in violation of 28 USC §455(a), which required his *sua sponte* recusal.

PRELIMINARY STATEMENT

This motion presents matters of general public importance in the administration of justice and the public's perception of the judiciary. Plaintiff was denied

due process and a fair trial because District Court Judge Thomas Wiseman should have disqualified himself from hearing the case pursuant to 28 USC §455(a) based on his and his family's close ties with Defendant, Vanderbilt University. Judge Wiseman did not disclose his conflict of interest at the time he

* * *

APPENDIX B

United States District Court
for the MIDDLE DISTRICT
District of 6th Circuit

PATRIZIA RICCARDI, MD
pro se

Plaintiff,

vs. **CASE NO.3:0605**

ROBERT KESSLER

Defendant.

NOTICE OF APPEAL

Notice is hereby given that PATRIZIA RICCARDI (here name all parties taking the appeal), hereby appeal to the United States Court of Appeals for the Sixth Circuit from ORDER DENYING (the final judgment) (from an order (describing it)) MOTION TO VACATE JUDGMENT entered in this action on the 20th day of MAY, 2010.

(s) Patrizia Riccardi
Address: 555 MAIN STREET
APT.515
NEW YORK, NY
10044
Attorney for

cc: Opposing Counsel ☑
Court of Appeals ☑

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon counsel of record this 16th day of June, 2010, via regular U.S. Mail delivery, first-class, postage prepaid, addressed as follows:

Kevin Hunter Sharp, Esq.
Drescher & Sharp, P.C.
1720 West End Avenue, Suite 300
Nashville, Tennessee 37203

/s/ Patrizia Riccardi
Patrizia Riccardi, MD

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Tel. (513) 564-7000
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Filed: June 23, 2010

Doctor Patrizia Riccardi
555 Main Street
Apartment 515
New York, NY 10094

Re: Case No. 10-5736,
Patrizia Riccardi v. Robert Kessler
Originating Case No. : 06-00605

Dear Sir or Madam,

This appeal has been docketed as case number **10-5736** with the caption that is enclosed on a separate page. Please review the caption for accuracy and notify the Clerk's office if any corrections should be made. The appellate case number and caption must appear on all filings submitted to the Court.

As the appellant, when you submit motions, briefs or any other documents to the Clerk's office, send only **1** original, with your signature. Copies are no longer necessary because the original documents will be scanned into the court's Electronic Case Filing system. You must mail opposing counsel a copy of

every document you send to the Clerk's office for filing.

Opposing counsel will docket pleadings as an ECF filer. Check the ECF page on the court's web site www.ca6.uscourts.gov for additional information about ECF filing if you are not familiar with it. The following forms are due by **July 7, 2010**.

Appellant: Transcript order form, designating whether transcript will be ordered

Appellee: Appearance of Counsel
Disclosure of Corporate Affiliation
Application for Admission to 6th Circuit Bar (if applicable)

The Clerk's office cannot give you legal advice but if you have questions about the forms, please contact the office for assistance.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035
Fax No. 513-564-7094

cc: Mr. Kevin H. Sharp

Enclosure

OFFICIAL COURT OF APPEALS CAPTION FOR 10-5736

PATRIZIA RICCARDI

Plaintiff-Appellant

v.

ROBERT KESSLER

Defendant-Appellee